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JAMES R. BROWNING, C[illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO. [illegible] 64

LOCAL 557, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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IN THE

OCTOBER TERM, 1959

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above-entitled case on February 18, 1960. Such judgment affirmed an order of the National Labor Relations Board directing petitioner to cease and desist from performing, maintaining or otherwise giving effect to a hiring hall or referral-of-employees agreement which allegedly violated Sections 8(a)(3), 8(b)(2) and 8(b)(1)(A) of the National Labor Relations Act, as amended, and to make one Lester H. Slater whole for any loss he may have suffered because of the discrimination allegedly practiced against him under the referral agreement.

OPINION BELOW

The Opinion of the Court of Appeals below is not yet reported and is attached hereto as Appendix A. See also R. 69.

JURISDICTION

The judgment of the Court of Appeals was entered on February 18, 1960, and the decree on March 10, 1960.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.

QUESTION PRESENTED

Whether an agreement between a union and an employer that employment of casual workers shall be obtained solely upon referral from a non-discriminatory dispatching service operated by the union is violative of the National Labor Relations Act on its face, and whether any such referral or hiring agreement must be deemed invalid if it does not expressly incorporate the following three requirements formulated by the National Labor Relations Board: (1) selection of applicants for referral to jobs shall be on a nondiscriminatory basis, (2) the employer retains the right to reject any job applicant referred by the union, and (3) the parties to the agreement post notices of all the provisions relating to the functioning of the hiring arrangement.

STATUTES INVOLVED

The pertinent provisions of the Labor-Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C. Section 151, et seq.), are Sections 7, 8(a)(1) and (3), 8(b)(1)(A), 8(b)(2):

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor

organization as a condition of employment as authorized in section 8(a)(3)."

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7";

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . ."

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: . . .

"(2) to cause or attempt to cause an employer in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership":

STATEMENT

A. *The Facts*

Petitioner Local 357 is a local labor organization located in Los Angeles, California, and is affiliated with the International Brotherhood of Teamsters. About May 1, 1955, petitioner, together with fifteen other affiliated Teamster Local Unions on the West Coast, and the International Brotherhood, entered into a collective bargaining contract known as the "Master Dry Freight Agreement" with California Trucking Assogiation, Inc., an association of motor truck operators (R. 55; 62-66). The Association executed this master agreement on behalf of about one thousand trucking firms of which Los Angeles—Seattle Motor Express, Inc., herein called the Company, is one (R. 55-60). The agreement was for a three year term commencing May 1, 1955 (R. 55).

The agreement provided that, with respect to those employers who operated within the territorial jurisdiction of a local union which maintained a dispatching service, the employers were to hire *casual* employees solely through the dispatching service unless such workers were unavailable from that source (R. 37, 49, 56; 62-63). The agreement stated this requirement in the following terms (R. 62-63):

> Casual employees shall, wherever the Union maintains a dispatching service, be employed *only on a seniority basis* in the Industry whenever such senior employees are available. An available list with seniority status will be kept by the Unions, and employees requested will be dispatched upon call to any employer who is a party of this Agreement. Seniority rating of such employees shall begin with a minimum of three months service in the Industry, *irrespective of whether such employee is or is not a member of the Union.* (Emphasis supplied.)
>
> Discharge of any employee by any employer shall be grounds for removal of any employee from seniority status. No casual employee shall be employed by any employer who is a party to this Agreement in violation of seniority status if such employees are available and if the dispatching service for such employees is available. The employer shall first call the Union or the dispatching hall designated by the Union for such help. In the event the employer is notified that such help is not available, or in the event the employees called for do not appear for work at the time designated by the employer, the employer may hire from any other available source.

Lester H. Slater was a member in good standing of petitioner Local 357 (R. 49). For some two years he had secured casual employment through the dispatching service maintained by Local 357 (R. 55). However, on August 27, 1955, he obtained employment with the Company as a casual employee without clearance through the dispatching service (R. 49, 54-55). On November 10, 1955, upon learning that Slater had secured casual employment without referral from the dispatching service, an officer of Local

357 responsible for maintaining observance of the agreement requested the Company to cease employing Slater as a casual employee except on proper referral through the dispatching service (R. 39, 49-50, 55). The Company honored the request in accordance with its agreement (*ibid.*). The Company had originally hired Slater as a casual employee without referral from the dispatching service based on a misapprehension that Local 357 had authorized Slater to seek casual employment by means other than recourse to the dispatching service (R. 54-55). Local 357 informed the Company and Slater that it had no objection to the Company's direct hire of Slater as a *regular* employee if it so desired, the requirement of referral through the dispatching service applying only to casual employment (R. 52).

There was no evidence or even claim that Local 357 applied the dispatching service in a discriminatory fashion for the more than one year that it had been in operation (R. 56-57, 58).

B. *The Proceedings Below*

Upon the filing of charges by Slater, the Board issued a complaint against petitioner and against the Company, alleging that the entering into and maintaining of the referral system, and the discharge of Slater upon his refusal to apply for employment as a casual employee through such referral system, constituted a violation of Sections 8(a)(3), 8(b)(2), 8(a)(1), and 8(b)(1)(A) of the Act. Following a hearing, the Trial Examiner in the case recommended dismissal of the complaint. R. 47 et seq. The Board reversed, finding that the agreement relating to the hiring or referral of casual employees was invalid *on its face* as constituting an "inherent and unlawful encouragement of union membership" absent express provisions in the agreement that: (1) selection of applicants to be on a nondiscriminatory basis; (2) the employer retain the right to reject any applicant; (3) the parties post notices of the

hiring or referral arrangement. The Board rested this conclusion upon its then recent decision in *Mountain Pacific Chapter of the Associated General Contractors*, 119 NLRB 883. (R. 37.) The reasoning which the Board followed in the *Mountain Pacific* and instant cases can fairly be summarized as follows: The agreement vests in the union exclusive authority to refer employees for casual employment; "it is reasonable to infer" that the union will exercise its authority discriminatorily by denying referral to employees because of nonmembership or default in the performance of a membership obligation; this anticipated discrimination in employment in the operation of the dispatching service encourages union membership by inducing employees to join the union and adhere to its rules in order to avoid loss of work from incurrence of the union's displeasure.

Board Member Murdock (who did not participate in the instant case) dissented in *Mountain Pacific* (id. at 887-891) on the ground that it had been well established in the law that the hiring hall is not per se unlawful and was condemned only when it had been proved that the hiring hall was in fact operated in a discriminatory manner, and that for the Board to presume that an otherwise lawful contract will be operated in an unlawful manner unless the contract includes certain Board announced objective criteria which will explain and justify the exclusive aspects of hiring hall referrals "amounts to nothing more than a finding that an otherwise lawful contract is unlawful unless the parties agree to include words expressing their lawful motivation." (id. at 890).

The Board in the instant case further concluded, based on its foundation finding that the requirement of referral for casual employment through the dispatching service was unlawful *per se*, that the Company's denial of casual employment to Slater, based on Local 357's request except on proper referral, constituted a violation of Section 8(a)

(3) and (1) of the Act by the Company and a violation of Section 8(b)(2) and (1)(A) by Local 357 (R. 39).

The Board entered an order against the Company and Local 357 requiring *inter alia* that (1) they cease giving effect to any agreement "which unlawfully conditions the hire of applicants for employment, or the retention of employees, upon referral or clearance" by a labor organization; (2) they jointly and severally reimburse Slater for any loss sustained by him by reason of the referral requirement; and (3) they jointly and severally reimburse all casual employees for any initiation fees and dues paid by them to Local 357 beginning with the period six months preceding the filing and service of the charge (R. 39-44).

Local 357 thereafter petitioned the court below for review of the Board's Decision and Order, and on February 18, 1960, a majority of that court (Judges Wilbur K. Miller and Danaher) in a per curiam decision which did not discuss the issue, affirmed the Board's decision and order except as to that portion of the order directing reimbursement of dues and fees paid to the union by all casual employees. Judge Edgerton, while concurring in the action of the majority in refusing to require such reimbursement of dues and fees, dissented from the majority's upholding of the Board's conclusion that the union's exclusive hiring hall or referral agreement violated the Act on its face. The basis for his dissent and for his conclusion that the Board's order should be set aside was as follows: Union hiring hall agreements or their equivalents have consistently been held to be legal under the Act absent evidence that the union in fact practiced discrimination thereunder. In this instant case not only was there no showing or attempt to show any discrimination in practice but the hiring hall or referral arrangement itself expressly negated discrimination in requiring that employment be obtained "only on a seniority basis," irrespective of whether the "employee is or is not a member of the union," so that the parties could not discriminate without violating the

agreement. The fact that the referral agreement did not contain the provisions required by the Board in the *Mountain Pacific* case does not make it unlawful, Congress not being concerned with the substantive terms of collective agreements. Slater, being a member of the Union in good standing, his discharge, far from being discriminatory, was rather for his failure to comply with the terms of a valid agreement, and it is not the purpose of the Act to furnish statutory protection to contract breachers. R. 71.

The judgment of the court was entered on February 18, 1960 and appears at R. 73, its decree at R. 74.

REASONS FOR GRANTING THE WRIT

I.

The decision of the majority below is in direct conflict with two decisions of the United States Court of Appeals for the 9th Circuit—*NLRB* v. *Associated General Contractors*, 270 Fed 2d 425, August 1959, and *Morrison-Knudsen Co.* v. *NLRB* Feb. 19, 1960.—F 2d— ; 45 LRRM 2907. In the first case the court reviewed the decision of the Board in *Mountain Pacific Chapter of the Associated General Contractors*, supra, in which the Board had first announced its doctrine of per se invalidity of hiring hall or referral arrangements where they did not contain the three provisions required by the Board, and which served for the basis of the Board's decision in the instant case, and the court held that the Board erred in its determination that a union operated hiring arrangement was invalid on its face, and further held that the Board was without power to require the incorporation into the hiring agreement of the three provisions in question. The Ninth Circuit stated that "the hiring hall is legal and has always been held so," and that any assumption of discrimination thereunder cannot be "a presumption of law arising from the naked provisions of the hiring hall contract alone." * * * "An agreement that the hiring of employees be done through particular union

officers does not violate the Act, absent evidence that the union unlawfully discriminated in supplying the company with personnel.'" * * *. "It is apparent then that a contract which contains discriminatory provisions is illegal per se. It is also patent that a contract which is fair on its face is not unlawful in and of itself simply because it does not contain clauses prohibitory of illegal action." In respect to the Board's requirement of contractual guarantees of nondiscrimination the court stated: "Such a rule would in practical effect shift the burden of proof on the question of discrimination from the General Counsel of the Board to the respondent."

The Ninth Circuit remanded the case to the Board with the observation that failure to include the Board's required clauses in a hiring or referral agreement might constitute evidence of an unlawful discriminatory intent, but the burden is upon the Board to prove discrimination as a fact.

In the Morrison-Knudsen case, supra, the court sharply reminded the Board that hiring or referral arrangements could not be considered per se violations of the Act or unlawful on their face.

The decision below is likewise in conflict with holdings of the 1st, 3rd, 6th, and 8th Circuits and a prior holding of the 9th Circuit, all of which united in expressing agreement with the 1950 observations of Senator Taft (S. Rep. No. 1827, 81st Cong., 2d Sess., 14) that:

> The National Labor Relations Board and the courts did not find hiring halls as such illegal, but merely certain practices under them. * * * Neither the law nor these decisions forbid hiring halls, even hiring halls operated by the unions, as long as they are not so operated as to create a closed shop * * *.

These holdings are *NLRB* v. *International Association of Heat and Frost Insulators*, 261 F. 2d 347,350 (C.A. 1); *NLRB* v. *Philadelphia Iron Works, Inc.*, 211 F. 2d 937, 943 (C.A. 3); *Eichleay Corp* v. *NLRB*, 206 F. 2d 799, 803 (C.A.

3); *Del E. Webb Construction Co.* v. *NLRB*, 196 F. 2d 841, 845 (C.A. 8); *NLRB* v. *F. H. McGraw and Co.*, 206 F. 2d 635, 641 (C.A. 6); *NLRB* v. *Swinerton & Walberg Co.*, 202 F. 2d 511, 514, cert. denied, 346 U.S. 814 (C.A. 9).

The most recent pronouncement of the above is that of the 1st Circuit in *International Association of Heat and Frost Insulators*, 261 F. 2d 347, 350. There the Court stated:

> It is not illegal for an employer to rely upon a union to provide it with employees. In some industries such as construction and shipping, where much of the work is necessarily of an intermittent nature and the employer's need for workers varies from day to day, a hiring hall or referral system has sprung up. Under this system the employer calls upon the union to supply him with the necessary workers. However, if this system operates so as to discriminate against non-union workers and makes possible only the employment of union members, it is an unfair labor practice.

Since there is direct conflict between the decisions of the court below and that of the 9th Circuit in *Mountain Pacific* and *Morrison-Knudsen* on the precise issue for which review is here sought, and since there is further conflict between the decision of the court below and the upholding of the legality of an arrangement for hiring or referral of employees through a union source, and the holding that there must be a factual showing of discriminatory practices thereunder before such arrangements can be called unlawful as made by the 1st, 3rd, 6th, 8th and 9th circuits, it is respectfully urged that this Court accept review for the purpose of resolving such conflict.

II.

Further ground for review is found in the fact that the present case involves an important question of the application and administration of the National Labor Relations Act as amended which has not been but should be settled by this court, and also a possible conflict with prior decisions of this Court.

A.

The dispatching service maintained by Local 357 is an example of what is commonly known as the union hiring hall. Hiring halls predominate in such important industries as maritime, stevedoring, and the building and construction trades, where employment is characteristically fluid and sporadic and the recruitment of a labor force by a particular employment is tailored to the require of a particular job. The confinement of the dispatching service in this case to the hire of *casual* employees identifies the element of the employment relationship which is ordinarily the reason for the operation of a hiring hall. It is designed to bring the worker and the job together by funneling both to a central point from which employment can be sought and obtained, regularized and shared, on an evenhanded basis. The union hiring hall is thus addressed to and solves a real economic need. Its use and the freedom of unions and employers to contract concerning it has been seriously curtailed by the decision of the Board in this case upheld by the court below, and it is important that a definitive determination of the scope of the Board's power to draw inferences in the use of such hiring or referral arrangements or to require the insertion of so-called protective clauses be made by this court.

We have seen that all circuits where the issue has been reviewed except that below have held that it is legal to establish by contract that a union shall refer employees for work so long as referral is in fact made upon a non-discriminatory basis. The referral agreement in the instant case is not and can in no way be declared invalid on its face; it can be performed according to its terms without effecting discrimination. Indeed, to follow its precise terms would ensure non-discriminatory hiring, and discriminatory hiring could result only if the terms of the agreement were breached. Seniority alone governs dispatch and is determined by industry service. And seniority commences on

three months industry service "irrespective of whether such employee is or is not a member of the Union." Accordingly, not only does the agreement affirmatively establish that seniority is the controlling standard, but it also expressly negatives union membership or the lack of it as a factor in its determination.

The crux of the unfair labor practice prohibited by Section 8(a)(3) and (b)(2) is encouragement or discouragement of union membership by discrimination in employment. The operation of the dispatching service in accordance with the agreement entails no discrimination in employment. The dispatching service applies to all seeking casual employment, is open to all, and is open to all on the same terms. Nor is denial of casual employment to Slater except on proper referral discriminatory. This simply requires Slater to perform his contractual obligation, the same as all other casual employees, to seek casual employment solely through the service. To require adherence to a collective bargaining agreement by the employees it covers is not discrimination in employment.

In the absence of discrimination in employment, it is irrelevant for the Board to assert that the operation of the dispatching service inherently encourages union membership. All benefits obtained by unions encourage membership, but only that encouragement which flows from discrimination in employment is prohibited. There was in this case no encouragement of union membership, purposeful or presumed, in any sense referrable to either the employee's status as a union member or his performance of the obligations of union membership.

Nor was there any violation of Section 8(a)(1) or (b)(1)(A) of the Act. These safeguard employees from abridgment of their "exercise of the rights guaranteed in Section 7," and the latter confers on employees the right to "refrain from" union or concerted activity. The only activity in this case in which the employees were required to

engage, and from which Slater sought to "refrain," was to seek casual employment only through the dispatching service if they chose to seek it at all. This is an obligation imposed by contract. Section 7 confers no protected right upon an employee to refrain from complying with an agreement.

The Board's invalidation of the dispatching service rests exclusively on its presumption that the union will operate it discriminatorily. To indulge this presumption of illegal conduct is in fundamental conflict with the civilized premise that the "law will never presume that parties intend to violate its precepts. . . ." *Owings* v. *Hull*, 9 Pet. 607, 628. An illegal "purpose is not to be presumed. The presumption is the other way. To be established it must be proved." *Mitchell* v. *United States*, 21 Wall. 350, 353. And in this case the proven facts do not permit but negative a conclusion that the dispatching service was actually discriminatorily operated or that the agreement contemplated any discrimination.

B.

The Board has created a presumption that a union will operate a referral system of employment discriminatorily and it has further held that there is no means of overcoming this presumption short of acquiesence in incorporating into the agreement the three requirements the Board decrees. But the Board is without power to require insertion of substantive terms into a collective bargaining agreement as its price for the valid establishment of a referral system. *NLRB* v. *American National Insurance Company*, 343 U.S. 395 at 404 and 409, and *Local 24 Teamsters Union* v. *Oliver*, 358 U.S. 283 at 295. "The Board has no general commission to police collective bargaining agreements and strike down contractual provisions in which there is no element of an unfair labor practice." (*Local 1976, United Brotherhood of Carpenters* v. *NLRB*, 357 U.S. 93 at 108). And the three requirements formulated by the

Board are in themselves objectionable: To grant the employer the right to reject any applicant referred by the union takes from the union the right to seek protection against rejection except for good cause; the requirement that the agreement explicity provide that selection of applicants shall be on a non-discriminatory basis takes from the contracting parties the right to determine whether they wish to add a contractual prohibition of unfair labor practices to the statutory obligation which already exists as a matter of law; and the requirement for posting of the hiring or referral agreement is one which can only be predicated on a prior finding of the commission of an unfair labor practice. *See Art Metals Construction Company* v. *NLRB*, 110 F. 2d 148 at 147 (C.A. 2). The Board thus begins with a presumption of illegality, which it has no power to indulge, and proceeds to the requirement that certain provisions be inserted into the agreement in order to overcome the presumption, which it has no power to impose.

C.

Slater was a member of Local 357 in good standing. There was no showing that he was in default in the performance of any obligation of union membership. Accordingly, neither lack of union membership or default in the discharge of an obligation of union membership could be, and there is no claim, showing, or finding that these were, the foundation for any action against Slater. On the contrary, the express finding is that the Company discontinued Slater's employment as a casual employee solely because he had obtained casual employment with it without recourse to the dispatching service, in compliance with Local 357's request not to employ him in that capacity except on proper referral. (R. 49-55). To have permitted Slater to retain his casual employment with the Company, secured by him in violation of the agreement, would have been to discriminate in his favor and against all the other employees who were fulfilling their contractual obliga

tion to work through the dispatching service. Action by an employer and a union to secure an employee's adherence to the terms of an agreement is not and cannot be discrimination in employment. *N.L.R.B.* v. *Farriers Joint Council*, 224 F. 2d 78 (C.A. 2), affirming the views of the dissenting Board member and the examiner, 108 N.L.R.B. 1506, 1511, 1520-1522; *N.L.R.B.* v. *Rockaway News Supply Co.*, 345 U.S. 71, 80.

As stated by Judge Edgerton in his dissent below, "To interpret the Act as 'furnishing statutory protection to employees who choose to violate valid provisions of labor-management contracts' would not be 'consistent with the underlying purpose of the Act to promote . . . collective bargaining agreements . . . .' *NLRB* v. *Farriers Joint Council*, 224 F. 2d 78, 80 (2d Cir.)."

The Board's asseveration of encouragement of union membership also glosses over the fact that it is the employer's "purpose" to encourage, which is "controlling." Specific proof of intent is unnecessary only in the sense that its existence is inferrable from the character and consequence of the conduct. The only relevant conduct disclosed in this case is the operation of a dispatching service not discriminatory either in its general or specific application. From these bare facts nothing is inferrable as to either the Company's or Local 357's purpose except that they sought to regularize casual employment and to require an employee who circumvented his contractual obligation to adhere to it. Especially is this so when it is remembered that the Company and Local 357 were operating under a master agreement negotiated by fifteen local unions and an association representing about one thousand employers. Surely an industry-wide purpose to engage in prohibited encouragement of union membership is not inferrable.

CONCLUSION

From what has been said above it is clear that not only is an important question of federal law presented in this

petition for review, but that the court below has decided a federal question of substance erroneously and in conflict with applicable decisions of this Court. The validity of many thousands of union hiring or referral arrangements in present operation throughout the United States has been brought into question by the decision of the Board in this case, and the upholding of that decision by the court below. Moreover, the decision of the court below conflicts directly with the decisions of the other circuit courts of appeal. It would appear that review by this Court is warranted and necessary.

It is respectfully submitted that, for the reasons asserted above, this Petition for a Writ of Certiorari should be granted.

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,794

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

Petition for Review of Order of the National Labor Relations Board and Cross-Application for Enforcement.

Decided February 18, 1960

Mr. Bernard Dunau, with whom *Messrs. Herbert S. Thatcher* and *David Previant* were on the brief, for petitioner.

Miss Rosanna A. Blake, Attorney, National Labor Relations Board, with whom *Messrs. Jerome D. Fenton*, General Counsel, National Labor Relations Board at the time the brief was filed, *Thomas J. McDermott*, Associate General Counsel, National Labor Relations Board, and *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, and *Mrs. Betty Janes Southard*, Attorney, National Labor Relations Board, were on the brief, for respondent.

Before EDGERTON, WILBUR K. MILLER and DANAHER, Circuit Judges.

PER CURIAM: Local 357 of the Teamsters union asks us to review and set aside, and the National Labor Relations Board asks us to enforce, an order of the latter which held an exclusive hiring hall agreement constitutes discrimination which encourages union membership within the meaning of Section 8(a)(3) and (1) and 8(b)(2) and (1)(A) of the National Labor Relations Act as amended, 61 STAT. 136, 65 STAT. 601, 29 U. S. C. § 158. The order directed the respondent employer, Los Angeles-Seattle Motor Express, and the union to cease and desist from performing, maintaining or otherwise giving effect to the condemned hiring hall agreement and to take certain affirmative action which the Board found would effectuate the purposes of the Act.

Among the affirmative acts which the order required of the union and employer jointly was to make whole one Lester H. Slater for any loss he may have suffered from the discrimination which the Board held had been practiced against him under the hiring hall agreement; and to reimburse all casual employees for the initiation fees and dues which, the Board said, had been "exacted from them as the price of their employment."

We think the Board's order is correct except that it goes too far in directing reimbursement of the dues and fees paid to the union by all casual employees. *National Labor Relations Board* v. *American Dredging Co.*, —— F. (2d) —— (3rd Cir. Jan. 8, 1960).[1] The order should be modified to confine the reimbursement feature to Slater alone. As so modified, the Board's order will be enforced.

It is so ordered.

[1] We have considered the opinion of the Seventh Circuit in *National Labor Relations Board* v. *Local 60, et al.*, —— F. (2d) —— (Jan. 22, 1960), but are constrained to the view that the Third Circuit opinion more aptly applies to the problem presented on the record before us.

EDGERTON, *Circuit Judge, dissenting:* The Board rightly says "The basic issue in this case is the propriety of the Board's finding that the Union's exclusive hiring hall agreement violated the Act on its face." I think this finding is wrong and the order should be set aside.

The court appears to hold that an exclusive hiring-hall agreement is necessarily unlawful. My impression is that "The hiring hall is legal and has always been held so." *N.L.R.B.* v. *Mountain Pacific Chapter of Associated General Contractors, Inc.*, 270 F. 2d 425, 429 (9th Cir. 1959). An "agreement that hiring of employees be done only through a particular union's offices does not violate the Act 'absent evidence that the union unlawfully discriminated in supplying the company with personnel.' 95 N.L.R.B. at 435." *N.L.R.B.* v. *Swinerton*, 202 F. 2d 511, 514 (9th Cir.), *cert. denied* 346 U.S. 814. "'The factor in a hiring-hall arrangement which makes the device an unfair labor practice is the agreement to hire *only* union members referred to the employer.' Del E. Webb Construction Co. v. N.L.R.B., 8 Cir., 1952, 196 F. 2d 844, 845." *Eichleay Corp.* v. *N.L.R.B.*, 206 F. 2d 799, 803 (3d Cir. 1953). The present hiring-hall arrangement expressly negatives any such agreement, by requiring employment to be "only on a seniority basis" irrespective of whether the "employee is or is not a member of the Union." Without violating this agreement, the employer cannot discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership" in the union, in violation of §8(a)(3) of the Labor Management Relations Act,[1] and the union cannot "cause or attempt to cause an employer to discriminate against an employee in violation of" that section.[2]

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[1] 61 Stat. 140 (1947) as amended, 29 U.S.C. § 158(a)(3) (1958).

[2] § 158(b)(2).

The agreement does not contain the language the Board required in the *Mountain Pacific* case, 119 N.L.R.B. 883, 897, but this does not make it unlawful. *N.L.R.B.* v. *Mountain Pacific Chapter of Associated General Contractors, Inc.*, 270 F. 2d 425, 431 (9th Cir.). "Within the area in which collective bargaining was required, Congress was not concerned with the substantive terms upon which the parties agreed." *Local 24 Interna'l Brotherhood of Teamsters etc.* v. *Oliver*, 358 U.S. 283, 295. The possibility that the arrangement may at some future time lead to unlawful discrimination does not invalidate it. *Shuttlesworth* v. *Board of Education*, 358 U.S. 101, *affirming* 162 F. Supp. 372, 384.

The court upholds the Board's finding that the discharge of employee Slater resulted from the hiring provisions of the contract and was discriminatory. Slater had not obtained or sought employment through the hiring hall. I think his discharge for this reason did not discriminate against him or violate the Act. To interpret the Act as "furnishing statutory protection to employees who choose to violate valid provisions of labor-management contracts" would not be "consistent with the underlying purpose of the Act to promote . . . collective bargaining agreements . . . ." *N.L.R.B.* v. *Furriers Joint Council*, 224 F. 2d 78, 80 (2d Cir.). Slater was a member of the Union in good standing. I cannot see that his discharge for failing to comply with an agreement between the Union and the employer encourages union membership.